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No. 04-514

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICKY BELL, Warden,

Petitioner,

vs.

GREGORY THOMPSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Sixth Circuit abuse its discretion by withdrawing its opinion affirming the denial of habeas corpus relief six months after Federal Rule of Appellate Procedure 41(d)(2)(D) made issuance of the mandate mandatory, without notice to the parties or any finding that the court's action was necessary to prevent a miscarriage of justice, particularly where state judicial proceedings to enforce the inmate's death sentence had progressed in reliance upon the finality of the judgment in the federal habeas proceedings?

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 6

I

Post-certiorari litigation in the original habeas case has become routine as a method of evading AEDPA's successive petition limits 6

II

Reconsideration of the first petition alters the balance of interests sharply from the one determined by Congress 10

A. Successive petitions and AEDPA 10

B. Successive petitions and post-certiorari reconsideration 13

III

Continued stay of the mandate and further reconsideration after denial of certiorari should be subject to the same limits as recall of the mandate 14

Conclusion 18

Appendix A A-1

TABLE OF AUTHORITIES

Cases

Calderon v. Thompson, 523 U. S. 538, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) 1, 6, 13, 14, 15, 17, 18

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 15

Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U. S. 653, 118 L. Ed. 2d 293, 112 S. Ct. 1652 (1992) 11

Griffith v. Kentucky, 479 U. S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) 6

Harris v. Vasquez, 949 F. 2d 1497 (CA9 1991) 10

Lindh v. Murphy, 521 U. S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997) 14

Lonchar v. Thomas, 517 U. S. 314, 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996) 16

McCleskey v. Zant, 499 U. S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) 9, 10, 17

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950) 4

People v. Anderson, 52 Cal. 3d 453, 276 Cal. Rptr. 356, 801 P. 2d 1107 (1990) 9

People v. Beardslee, 53 Cal. 3d 68, 279 Cal. Rptr. 276, 806 P. 2d 1311 (1991) 9

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) 9, 11, 12

Schlup v. Delo, 513 U. S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995) 9, 11

Slack v. McDaniel, 529 U. S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) 13

State v. Thompson, 768 S. W. 2d 239 (Tenn. 1989) 2, 3

Stewart v. LaGrand (Karl), 525 U. S. 1173, 143 L. Ed. 2d 105, 119 S. Ct. 1107 (1999) 8

Stewart v. LaGrand (Walter), 526 U. S. 115, 143 L. Ed. 2d 196, 119 S. Ct. 1018 (1999) 8

Stewart v. Martinez-Villareal, 523 U. S. 637, 140 L. Ed. 2d 849, 118 S. Ct. 1618 (1998) 13

Swain v. Pressley, 430 U. S. 372, 51 L. Ed. 2d 411, 97 S. Ct. 1224 (1977) 16

Thompson v. Bell, 315 F. 3d 566 (CA6 2003) 3, 4, 18

Thompson v. Bell, 373 F. 3d 688 (CA6 2004) .. 3, 4, 14, 15

Thompson v. State, 958 S. W. 2d 156 (Tenn. Crim. App. 1997) 3

United States v. Ohio Power Co., 353 U. S. 98, 1 L. Ed. 2d 683, 77 S. Ct. 652 (1957) 17

Vasquez v. Harris, 503 U. S. 1000, 118 L. Ed. 2d 418, 112 S. Ct. 1713 (1992) (No. A-766) 11

Vasquez v. Harris, 503 U. S. 1000, 118 L. Ed. 2d 419, 112 S. Ct. 1713 (1992) (No. A-768) 11

United States Statutes

28 U. S. C. § 452 17

28 U. S. C. § 2244(b)(3)(e) 8

28 U. S. C. § 2244(d)(1)(A) 6

28 U. S. C. § 2253(c) 8

Rule of Court

Fed. Rule App. Proc. 41(d)(2) 6, 8

State Statute

Cal. Penal Code § 190.2 9

Miscellaneous

141 Cong. Rec. (1995) 11, 12

142 Cong. Rec. (1996) 11

Hack, The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996, 30 Am. J. Crim. L. 171 (2003) ... 16

Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295 (1992) .. 10, 11

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) 16

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

CJLF has appeared as *amicus curiae* in this Court in many cases implementing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), including *Calderon* v. *Thompson*, 523 U. S. 538 (1998). We have sought to have this

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

Act implemented and enforced as Congress intended, opposing the numerous attempts to evade and sabotage it.

This case involves yet one more such attempt. When this Court denied certiorari in Gregory Th ompson's federal habeas case, that should have been the end of federal review, unless he could qualify for the very narrow exception provided by Congress for successive petitions. Instead, the Sixth Circuit gave him the very "second bite at the apple" that Congress intended to reserve for the actually innocent. It did so by manipulating the mandate in a manner unheard of in habeas practice prior to AEDPA, but which is now becoming routine. This evasion of the clear intent of Congress is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Twenty years ago, Brenda Lane went shopping at a Wal-Mart store in Shelbyville, Tennessee. Gregory Thompson abducted her at knifepoint and forced her to drive to a remote location. There he stabbed her, ran over her with her own car, and left her. He drove her car to Marietta, Georgia, where he set it on fire. See *State* v. *Thompson*, 768 S. W. 2d 239, 243 (Tenn. 1989). There is no doubt whatever in this case of Thompson's identity as the perpetrator. He was cited for speeding while driving Mrs. Lane's car on Interstate 24, on the way back to Georgia. After his arrest, he confessed and told the police where to find Mrs. Lane's body. See *ibid.*

Thompson had no defense at the guilt phase and was convicted. See *id.*, at 244. At the penalty phase, defense counsel presented background evidence and the testimony of a clinical psychologist. The prosecution rebutted with its own psychologist who presented substantial evidence of malingering. The jury found three aggravating circumstances (torture or depravity, avoiding arrest, and felony murder) and imposed the death penalty. See *ibid.* On direct appeal, the Tennessee Supreme Court reviewed Thompson's claims of

ineffective assistance of counsel, among others, and affirmed. See *id.*, at 244-253.

In 1990, Thompson filed a petition for postconviction relief. After several years and an evidentiary hearing, the trial court denied relief. The Court of Criminal Appeals affirmed, rejecting ten claims: four on the merits, four as previously adjudicated, and two as defaulted. See *Thompson* v. *State*, 958 S. W. 2d 156, 159-160 (1997). The Court considered multiple allegations of ineffective assistance not already resolved on direct appeal, including mental claims that Thompson's head injuries had not been sufficiently investigated and presented. The court found both prongs of the ineffective assistance test missing: no deficient performance because counsel reasonably relied on the opinions of two experts, and no prejudice because Thompson had not demonstrated that he actually did have brain damage. *Id.*, at 165. The Tennessee Supreme Court denied discretionary review of this decision.

On June 12, 1998, Thompson filed a petition with the Federal District Court. See Pet. for Cert. 3. The District Court authorized discovery, including depositions of Thompson's experts, Dr. Faye Sultan and Dr. Barry Crown. See *Thompson* v. *Bell*, 315 F. 3d 566, 582-583 (CA6 2003). On February 12, 1999, Thompson filed a motion with an affidavit by Dr. Sultan, but that affidavit expressed no opinion regarding Thompson's mental state at the time of the crime. See *id.*, at 583, n. 13.

Dr. Sultan wrote a report, dated July 22, 1999, in which she opined that Thompson had schizoaffective disorder, bipolar type and was suffering from that illness at the time of the offense. See *Thompson* v. *Bell*, 373 F. 3d 688, 717-718 (CA6 2004) (Suhrheinrich, J., concurring in part and dissenting in part). Counsel for the warden took Dr. Sultan's deposition the same day. See *ibid.*

The warden moved for summary judgment, and neither party submitted the Sultan materials. See *id.*, at 690 (majority opinion). The District Court granted summary judgment for the

warden on February 17, 2000. While the appeal was pending, Thompson filed a Rule 60(b) motion in the District Court to supplement the record with the Sultan materials and attached the same materials to a motion in the Court of Appeals to hold the appeal in abeyance pending the 60(b) motion. See *ibid.* The District Court denied the 60(b) motion. Pet. for Cert. 4. Although actually aware at this point that the Sultan materials were not part of the record, counsel for Thompson did not ask the Court of Appeals to supplement the record itself or review the District Court's refusal to do so. See Docket, *Thompson* v. *Bell*, USCA 6, No. 00-5516 (no such motion in the docket). The Court of Appeals chose not to consider the Sultan deposition, because it was not part of the appellate record. 373 F. 3d, at 690.

The Court of Appeals affirmed denial of summary judgment, finding no genuine issue of material fact. See 315 F. 3d, at 595. Judge Moore concurred in the result, also based on lack of evidence, see *ibid.*, and Judge Clay dissented. See *id.*, at 596.

On petitioner's motion, the Court of Appeals stayed the mandate, pending certiorari. Pet. for Cert. 4. On December 1, 2003, this Court denied certiorari. Thompson immediately requested and received a further stay to file a petition for rehearing in this Court and "thereafter until the Supreme Court disposes of the case." Pet. for Cert. 5. No further stays of the mandate were requested or granted. This Court's denial of rehearing was filed in the Court of Appeals on January 23, 2004. Despite the clear wording of Federal Rule of Appellate Procedure 41(d)(2)(D) and the last stay order, the mandate did not issue. The state proceeded with setting an execution date and determining competency to be executed. Pet. for Cert. 5-6.

Without notice to the state or an opportunity to be heard, Judge Suhrheinrich conducted his own review of the record. See 373 F. 3d, at 692-693 (Suhrheinrich, J., concurring in part and dissenting in part); cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). Six months after this

Court's denial of rehearing on the certiorari petition, the Court of Appeals issued an opinion *sua sponte* supplementing the record, reconsidering its affirmance based on the additional information, vacating the District Court's judgment, and remanding for an evidentiary hearing. This Court granted certiorari on January 7, 2005.

SUMMARY OF ARGUMENT

Continued litigation of the original habeas petition after this Court's denial of certiorari was nearly unheard of before AEDPA. Now it has become routine as a way to evade Congress's strict limit on successive petitions. A study of Ninth Circuit cases by CJLF shows that in seven of the last twelve cases, there was significant litigation of the original petition after denial of certiorari.

Reconsideration of the first petition alters the balance of interests sharply from the one determined by Congress. In enacting AEDPA, Congress determined that capital cases routinely dragged on too long after the normal end of the first federal petition. Although in this case, as in *Calderon* v. *Thompson*, the successive petition limit does not apply directly, the "objects of the statute" still guide the courts in their exercise of discretionary powers.

Post-certiorari stay of the mandate and further reconsideration should be governed by the limits for recall of the mandate established in *Calderon* v. *Thompson*. A more stringent standard would result in the absurdity of issuing a mandate and immediately recalling it. Any less stringent standard would authorize widespread evasion of AEDPA. Congress has decided which habeas petitioners will get more than one "bite at the apple" and which will not. In so deciding, Congress has balanced the state's interest in finality against the petitioner's interest in preventing a miscarriage of justice. As this Court noted in *Lonchar* v. *Thomas*, courts must not

undermine that balance through the use of "background" powers.

ARGUMENT

I. Post-certiorari litigation in the original habeas case has become routine as a method of evading AEDPA's successive petition limits.

In *Griffith* v. *Kentucky*, 479 U. S. 314, 321, n. 6, (1987), this Court defined a "final" case in the context of the direct review process as one where "the availability of appeal [has been] exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." See also 28 U. S. C. § 2244(d)(1)(A) ("final" for statute of limitation purposes). Of course, a criminal case is not truly final in the ordinary sense of that word until the collateral reviews are also final. The present case, like *Calderon* v. *Thompson*, 523 U. S. 538 (1998), deals with the question of when the initial federal habeas petition can be considered final.

The answer, at least in all but the most extraordinary cases, should be the same as *Griffith*'s standard for direct review. That is, denial of certiorari by this Court, or the expiration of time to request it, should normally be the end of the line as to that proceeding. Further proceedings, such as successive petitions, may be available if and when Congress has decided that the benefits of permitting them outweigh the costs, but the initial habeas should be over.

And so it was, prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Recall of mandate by Courts of Appeals was so rare that some Justices doubted whether such a power even existed. See *Calderon*, 523 U. S., at 549-550 (citing *United States* v. *Ohio Power Co.*, 353 U. S. 98, 102-103 (1957) (Harlan, J., dissenting)). Although Courts of Appeals are clearly authorized to stay their mandates pending certiorari, see Fed. Rule App. Proc. 41(d)(2) (cited below as "Rule 41"), such a stay was rarely requested before

Calderon. The normal mechanism for further federal review was the successive petition.

To see how things have changed, *amicus* CJLF studied all of the cases from the Ninth Circuit that have proceeded to execution from 1998 through January 2005, excluding so-called "volunteers." We retrieved the dockets through the on-line Pacer system,[2] and examined them for issuance of the mandate and for further litigation after this Court's denial of certiorari. The results are described in Appendix A.

In the first seven cases (*Calderon* v. *Thompson* is the fifth), we see that the petitioner did not ask for the mandate to be stayed before filing the certiorari petition, in accordance with usual pre-AEDPA practice. In the first four cases, we see one application for leave to file a successive petition (the mechanism provided by Congress), two attempts to file successive petitions without leave, and one motion under Federal Rule of Civil Procedure 60(b).[3] In July 1997, Thompson's lawyers hit on the idea of a motion to recall the mandate as a way around the successive petition limit, resulting ultimately in this Court's decision on April 29, 1998.

The *Gillies* and *Gerlaugh* cases were already in their late stages when *Calderon* v. *Thompson* was decided, and their counsel apparently decided to seek other ways around AEDPA's limits. They both filed civil rights suits and original habeas petitions in appellate courts, ultimately unsuccessfully.

In the remaining twelve cases, we see that continuing to litigate the original habeas case after this Court's denial of certiorari has now become routine. Siripongs, Vickers, Michael Poland, and Chaney all moved to recall the mandates, despite the high standard set by this Court in *Calderon*. In *Vickers*, this

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2. The reason for cutting off the study at 1998 is that dockets for most older cases are not available on-line.

3. This maneuver is the subject of another case this Term, *Gonzalez* v. *Crosby*, No. 04-6432.

motion was considered seriously enough to hold a telephonic oral argument on it. Ortiz tried the Rule 60(b) gambit, to be considered further in *Gonzalez*.

Five of the inmates did not attempt further litigation on the original petition. The LaGrand brothers filed successive petitions without meeting the AEDPA standard, and were granted relief by the Ninth Circuit, requiring this Court's intervention twice. See *Stewart* v. *LaGrand (Karl)*, 525 U. S. 1173 (1999); *Stewart* v. *LaGrand (Walter)*, 526 U. S. 115 (1999). Babbitt and Poland tried original writs in this Court, as well as certiorari petitions on their successive habeas petitions, even though such petitions are expressly forbidden by 28 U. S. C. § 2244(b)(3)(E). Only Darrell Rich did not attempt an end-run. His civil suit did not attempt to prevent the execution, but was on another matter.

The last two cases show how post-certiorari stay of the mandate is being used to evade the intent of Congress in capital litigation today. In *Anderson*, petitioner requested and received a stay of the mandate pending a petition for certiorari. The day after this Court's conference on Anderson's certiorari petition, but before denial was formally announced, Anderson moved in the Court of Appeals to renew the rehearing petition denied over five months earlier and to continue the stay of the mandate. The panel denied the motion, but the Court of Appeals considered it en banc. The mandate finally issued five weeks after denial of certiorari, rather than "immediately." Cf. Rule 41(d)(2)(D).

Most disturbing is the recently concluded *Beardslee* case. Again, the petitioner requested and received a stay of the mandate pending certiorari. He requested a further stay on the day certiorari was denied, and received it. The Court of Appeals stayed the mandate again after this Court denied rehearing, this time to reconsider the *certificate of appealability*, a procedure Congress intended for the *beginning* of the appellate process, not the end. See 28 U. S. C. § 2253(c).

Oral argument was held on this motion, then more briefing, then another oral argument. The panel issued a supplemental opinion, which petitioner promptly followed with yet another petition for rehearing and rehearing en banc, followed by yet another certiorari petition when that was denied. A civil suit was litigated concurrently with all this, ending in another certiorari petition.

These are cases of clearly guilty murderers with undoubtably true death-eligibility circumstances. See *People* v. *Anderson*, 52 Cal. 3d 453, 465, 801 P. 2d 1107, 1111-1112 (1990) (caught red-handed in burglary/murder of elderly woman); *People* v. *Beardslee*, 53 Cal. 3d 68, 85, 806 P. 2d 1311, 1317-1318 (1991) (defendant testified to killing two women); Cal. Penal Code §§ 190.2(a)(3), (a)(17)(G) (multiple murder and burglary-murder). That is, there is no genuine question in either case that the judgment is not a miscarriage of justice as defined in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992) and *Schlup* v. *Delo*, 513 U. S. 298 (1995). Yet the proceedings have come to resemble the situation before AEDPA, and even before *McCleskey* v. *Zant*, 499 U. S. 467 (1991).

In seven of the last twelve cases, between post-certiorari proceedings to stay or recall the mandate and Rule 60(b) motions, there was substantial litigation on the original habeas petition after this Court's denial of certiorari. The denial of habeas relief is reconsidered as a matter of course, and the state must devote its resources to rebriefing and rearguing the same case it has already successfully defended many times, diverting resources from other cases in the pipeline.

The question before the Court is whether this reversion to the *status quo ante* is consistent with the spirit and intent of AEDPA, and, if not, whether the use of general powers to defeat Congress's specific intent is legitimate.

II. Reconsideration of the first petition alters the balance of interests sharply from the one determined by Congress.

A. Successive Petitions and AEDPA.

Of all the problems in capital habeas litigation prior to AEDPA, none cried out for reform more loudly than the abuse of the writ by repeated petitions. This is the area where Congress was most emphatic in its determination to curtail abusive practices. The exemplar of abuse was the Ninth Circuit's notorious mishandling of the case of Robert Alton Harris.

In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), this Court tightened the restrictions on successive petitions by adopting the cause-and-prejudice/actual innocence standard from the procedural default cases, replacing the "deliberate abandonment" standard. See *id.*, at 490, 493-494. It was widely believed that this tightening of the standard would curtail the abuse of successive petitions and allow most cases to proceed to execution reasonably soon after the decision on appeal of the first federal habeas petition. Indeed, *amicus* CJLF proposed this standard to the *McCleskey* Court, see *id.*, at 523, n. 10 (Marshall, J., dissenting), in the belief that it would strike the appropriate balance. Regrettably, the *Harris* case would soon demonstrate that stronger medicine was needed.

Eleven years after his conviction and sentence for a double murder, Robert Alton Harris filed his *third* federal habeas petition. See *Harris* v. *Vasquez*, 949 F. 2d 1497, 1500 (CA9 1991). Four months after *McCleskey*, a panel of the Ninth Circuit affirmed denial of habeas relief, based on *McCleskey* as well as other grounds. See *id.*, at 1501. Yet justice in this case, already long overdue, was further delayed by a blizzard of filings at every level of the federal courts, on top of state proceedings. See Lungren & Krotoski, Public Policy Lessons from the Robert Alton Harris Case, 40 UCLA L. Rev. 295, 321-326 (1992). The Ninth Circuit and its judges issued three stays,

see *id.*, at 324, which were vacated by this Court in *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-766) and *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992) (*per curiam*). An individual circuit judge issued yet another stay after Harris was already in the gas chamber, resulting in this Court's extraordinary order that the lower federal courts would issue no further stays. See *Vasquez* v. *Harris*, 503 U. S. 1000 (1992) (No. A-768).

The outrage from this debacle reverberated across the nation. As the various habeas reform bills moved through Congress, supporters of reform repeatedly cited *Harris* as the prime example of what was wrong with the system. See 141 Cong. Rec. 4107-4108 (1995) (statement of Mr. Cunningham); *id.*, at 4111-4113 (statement of Mr. Cox); *id.*, at 9304, col. 2-3 (statement of Sen. Specter); *id.*, at 14734, col. 1 (statement of Sen. Feinstein); *id.*, at 15019, col. 2 (statement of Sen. Specter); 142 Cong. Rec. 4610, col. 1 (1996) (statement of Mr. Hyde); *id.*, at 7562, col. 3 (statement of Sen. Feinstein); *id.*, at 7798, col. 2-3 (statement of Sen. Specter); *id.*, at 9462, col. 2 (statement of Sen. Abraham).

Although other parts of the habeas reform were highly controversial, there was broad, bipartisan consensus that strong measures were needed on successive petitions. Senator Biden, the principal opponent of the "deference" standard of 28 U. S. C. § 2254(d), agreed that "strict" limits on successive petitions were in order. See 141 Cong. Rec. 15047, col. 3 (1995).

The result is the stringent standard of 28 U. S. C. § 2244(b). Under paragraph (1), reconsideration of a previously litigated claim is absolutely prohibited with no exceptions. Under paragraph (2), a new claim may be considered only if it is either a new rule, retroactive on habeas corpus, or if it is based on facts both newly discovered *and* clearly refuting guilt of the underlying offense. Miscarriage of justice in the sense of *Schlup* v. *Delo*, 513 U. S. 298 (1995), innocence of the offense, is no longer enough by itself, and the *Sawyer* v. *Whitley*, 505

U. S. 333 (1992) standard of ineligibility for the death penalty has been completely abrogated.

In some of the pre-AEDPA cases, "successive" claims referred to reassertion of previously adjudicated claims, while "abuse of the writ" referred to inexcusable assertion of new claims after the first petition. See *Sawyer*, 505 U. S., at 338. However, Congress copied the term "second or successive petition" from former Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), where it referred to any petition after the first, whether the grounds were new or repeated.[4] Section 2244(b)(1) deals with the claims previously termed "successive," while (b)(2) deals with the "abusive" claims.

Taken literally, the term "second or successive" would apply to any petition after the first, regardless of the reason for disposition of the first. However, this Court has applied the statute to further its purpose, and not literally. The purpose was to limit habeas petitioners, particularly in capital cases, to "one bite of the apple."

> "By imposing filing deadlines on all death row inmates, and by limiting condemned killers convicted in State or Federal court to one Federal habeas petition—*one bite of the apple*—these landmark reforms will go a long, long way to streamline the lengthy appeals process and bridge the gap between crime and punishment in America.
>
> "It is dead wrong that we must wait 8, or 9, or even 10 years before a capital sentence is actually carried out. And, of course, it is terribly unjust to the innocent victims of violent crime and their families." 141 Cong. Rec. 15095, col. 1-2 (1995) (statement of Sen. Dole) (emphasis added); see also *id.*, at 15048, col. 2 (statement of Sen. Biden).

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4. Section 2244, as amended by AEDPA, made the prior Rule 9 unnecessary, and it was amended effective Dec. 1, 2004, to be little more than a cross-reference to § 2244(b).

When claims or petitions have been dismissed as unripe or unexhausted, there has been no bite, and hence the second petition is treated as a first. See *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 644-645 (1998); *Slack* v. *McDaniel*, 529 U. S. 473, 486-487 (2000).

B. Successive Petitions and Post-Certiorari Reconsideration.

The present case is the mirror image of *Slack* and *Martinez-Villareal*. While those petitioners came within the literal terms of a "second" petition, they had not received the one bite at the apple that Congress intended to provide. In this case, as in *Calderon*, the petitioner does not come within the literal terms of § 2244(b), yet he has obtained the second bite at the apple that Congress intended to preclude.

Part III-A of *Calderon* v. *Thompson*, 523 U. S. 538, 553-554 (1998), lays down the ground rules for the direct application of § 2244(b) to a recall of the mandate. In this part of *Calderon*, there is no apparent reason to distinguish the recall of the mandate in that case from the failure to issue it and reconsideration of the merits. If motions to recall the mandate were not subject to the statute, "petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.*, at 553. That is precisely what happened in the *Anderson* and *Beardslee* cases, described in Part I, *supra*, at 8-10. By obtaining a stay of the mandate pending certiorari, and then further delay after Rule 41(d)(2)(D) required issuance, the petitioners in those cases achieved the relitigation and delay that § 2244(b) forbids.

Under *Calderon*, the statute applies directly whenever (1) the reconsideration is "pursuant to a prisoner's 'application,' " as opposed to *sua sponte*, or (2) whenever the reconsideration is based on new claims or evidence, "irrespective of whether the court characterizes the action as *sua sponte*." 523 U. S., at 554.

In the present case, the Court of Appeals characterized its action as *sua sponte* and the supporting evidence was presented to that court well before its initial decision of the case. See *Thompson* v. *Bell*, 373 F. 3d 688, 689-690 (CA6 2004). Under *Calderon*, then, the statute does not apply directly, and that presumably is why this Court's grant of certiorari was limited to Question 2, abuse of discretion, not Question 1, violation of § 2244(b). That does not, however, render the statute irrelevant.

> "Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute. In a habeas case, moreover, the court must be guided by the general principles underlying our habeas corpus jurisprudence. We now consider those principles as applied to this case." *Calderon*. 523 U. S., at 554.

III. Continued stay of the mandate and further reconsideration after denial of certiorari should be subject to the same limits as recall of the mandate.

By its terms, Rule 41(d)(2)(D) makes no exception to its imperative for issuance of the mandate immediately upon denial of certiorari. This is in contrast to the express provisions for the court of appeals to change the usual issuance times in subdivisions (b) and (d)(1). Under standard principles of construction, the presence of this authority in two subdivisions and absence in the third should be understood to mean there is no authority to continue the stay after denial of certiorari. See, *e.g.*, *Lindh* v. *Murphy*, 521 U. S. 320, 327 (1997). However, since *Calderon* recognized a power to recall mandates already issued, it would be absurd to issue a mandate only to immediately recall it. To avoid the absurdity, Rule 41(d)(2)(D) must be understood to implicitly authorize continued stay of the mandate under the same circumstances that would justify a recall.

To be sure, there are some factual differences between *Calderon* v. *Thompson*, 523 U. S. 538 (1998) and the present case. In that case, the mandate had actually issued. See *id.*, at 556. In the present case, the events prescribed by rule for the mandate to issue had occurred, and there was no order for further stay in effect, but the mandate had not actually issued. Hence, further proceedings were not undertaken in reliance on an actually issued mandate. Cf. *id.*, at 556-557. Yet in many other ways, the cases are similar. Lengthy federal proceedings have run their normal course, these followed extensive state proceedings at trial, on appeal, and on state collateral review, and the state was proceeding to execute its judgment in the well-founded belief that the federal habeas proceeding was over. Cf. *id.*, at 556.

In the present case, as well, we can put to one side two variations on the theme that were not involved in *Calderon* and not involved here. This case does not involve correction of a clerical error. Cf. *id.*, at 557. Notwithstanding the intensity of the concurring opinion in the Court of Appeals, this case also does not involve a fraud on the court. The majority held it did not, see *Thompson* v. *Bell*, 373 F. 3d 688, 690 (CA6 2004), and Thompson did not cross-petition for review of that ruling. This appears to be a garden variety error by habeas counsel, see *ibid.*, which is not cause for relief from a procedural default, even when it amounts to ineffective assistance. See *Coleman* v. *Thompson*, 501 U. S. 722, 754 (1991).

Calderon did not limit its rule to the particular facts of that case. The rule it established applies to all cases where "a court of appeals recalls its mandate to revisit the merits of its earlier decision . . . ." 523 U. S., at 557. The key consideration in finding "the State's interests in finality are all but paramount" was that "[t]he prisoner has already had extensive review of his claims in federal and state courts." *Ibid.*

When Congress adopted AEDPA, it struck a balance between finality and ensuring full review of the prisoner's claims. Congress rejected a plan to give state court decisions

the same preclusive effect as District of Columbia court decisions, thereby keeping the federal habeas route open. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945-946 (1998); see also *Swain* v. *Pressley*, 430 U. S. 372, 382-383 (1977). At the same time, though, it enacted the "deference" standard of 28 U. S. C. § 2254(d) and the limit on successive petitions in § 2244(b).

The deference standard represents Congress's policy decision regarding the appropriate balance on the first federal petition in its normal course. The successive petition rule, together with the statute of limitations in § 2244(d), represent Congress's policy decision on the reconsideration of previously litigated claims and the consideration of claims raised late. "[T]he balancing of interests undertaken by Congress . . . [is one] which courts may not undermine through the exercise of background equitable powers." *Lonchar* v. *Thomas*, 517 U. S. 314, 327 (1996).

Predictably, the enactment of AEDPA was met with calls to circumvent it by those who disagree with Congress's assessment of the costs and benefits of relitigation. One law review article lauds "creative ways to avoid the strictures of the AEDPA" and "hold[s] out the possibility of retaining some of the flexibility lost with the enactment of AEDPA." Hack, The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996, 30 Am. J. Crim. L. 171, 221, 223 (2003). This is quite simply a call for judicial sabotage of Congress's policy choice. The "flexibility" sought to be restored is the relitigation and delay that Congress sought to limit to a few, rare cases.

In implementing its policy choices, Congress did not scour the rules and practices of courts to hermetically seal every loophole that might be employed to defeat those choices. The Court would set a dangerous precedent if it required Congress to resort to such extremes in order to achieve its objectives. If scorched-earth legislation is what it takes to strike the balance where Congress chooses to strike it, such legislation may be

forthcoming. For example, Congress abolished the restrictive "end of term" rule in 1948, see 28 U. S. C. § 452, the effect of which "was to leave the federal courts untrammeled in establishing their own rules of finality." *United States* v. *Ohio Power Co.*, 353 U. S. 98, 103 (1957) (Harlan, J., dissenting). If that power is used to defeat Congress's policy choices, such restrictive rules may return.

One round of federal review, with deference to the state court decision, is what Congress decided was appropriate in all but the most extraordinary case. In the ordinary course of things, that means a decision by the district court, an appeal, possibly a petition for rehearing en banc, and possibly a petition for certiorari to this Court. That should be the end. Further litigation, at least in federal courts, should be reserved for cases of miscarriage of justice.

Calderon dealt with a power that was not found in the rules or statutes but which a court of appeals was nonetheless thought to possess inherently. See 523 U. S., at 549-550. The present case deals with an exercise of power contrary to the plain wording of Rule 41(d)(2)(D). If such a power is deemed to exist to avoid the absurdity of issuing a mandate and then immediately recalling it, see *supra*, at 14, the power should be limited to that necessity. From the habeas petitioner's viewpoint, the need to reconsider a decision *sua sponte* after certiorari is denied, but before the mandate issues, is no greater than the need to reconsider after the mandate issues. From the state's viewpoint, it has defended its judgment through the same multiple levels of review in either situation. See *Calderon*, *supra*, at 557.

Complete fidelity to the policy choice of Congress would require drawing the line at the same place as § 2244(b). However, *Calderon* drew the line at miscarriage of justice as defined in this Court's pre-AEDPA jurisprudence, and it would be anomalous to have a more restrictive standard here. Given the similarity of the interests involved, it makes sense to draw the line in the same place. Cf. *McCleskey* v. *Zant*, 499 U. S.

467, 493 (1991) (unifying standards for procedural default and successive petition).

To establish a miscarriage of justice, a habeas petitioner must show by the requisite standards either that he is not guilty of the offense or that none of the death-eligibility circumstances is true. See *Calderon*, 523 U. S., at 560. Thompson's evidence does not negate his commission of the crime or any of the three aggravating circumstances. See *Thompson* v. *Bell*, 315 F. 3d 566, 576 (CA6 2003). It would qualify as actual innocence only if the evidence were compelling proof that he was not guilty by reason of insanity, such that " 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition." 523 U. S., at 559 (quoting *Schlup* v. *Delo*, 513 U. S. 298, 327 (1995)). The Court of Appeals' action in this case without such a finding was error.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

February, 2005

Respectfully submitted,

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APPENDIX A

Ninth Circuit Cases Ending in Execution

The following is a list of persons executed in the Ninth Circuit from January 1998 through January 2005, excluding those who voluntarily dropped challenges to their execution, with a description of proceedings in federal court after the United States Supreme Court's denial of certiorari on the initial habeas petition. The descriptions are derived from information in the Ninth Circuit's on-line docket (Pacer), the opinions on its Web site, and the published opinions and orders of the United States Supreme Court.

Jose Ceja, Arizona, executed Jan. 21, 1998:

First habeas case 94-99005, certiorari denied Nov. 10, 1997. Mandate had already issued. No further proceedings of substance on that case. Filed original habeas in Ninth Circuit, 98-80040, denied. Filed new habeas in District Court, contending *Lackey*[1] and method of execution claims not subject to AEDPA. Denial affirmed in case 98-99000. Judge called for en banc vote, failed.

Terry Langford, Montana, executed Feb. 24, 1998:

Habeas case 95-99001, certiorari denied Oct. 6, 1997. Mandate had already issued. Filed 60(b) motion in District Court: denied. CPC denied in case 97-99035, cert. denied.

Jose Villafuerte, Arizona, executed Apr. 22, 1998:

First habeas case 93-99015, certiorari denied Jan. 20, 1998. Mandate had already issued. No further proceedings of

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1. See *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (length of time execution has been delayed by prisoner's own appeals proffered as reason *not* to proceed with execution).

substance on that case. Moved for leave to file successive petition, 98-80303, denied.

Douglas Gretzler, Arizona, executed June 3, 1998:

First habeas case 95-99023, certiorari denied Feb. 9, 1998, rehearing denied Mar. 9, 1998. Mandate had already issued. No further proceedings of substance on that case. Second habeas petition on *Lackey* claim, similar to *Ceja*, denied. Denial affirmed and leave to file successive denied in case 98-80394/99-99019.

Thomas Thompson, California, executed July 14, 1998:

First habeas case 95-99014, certiorari denied June 5, 1997. Mandate issued June 11, 1997. Motion to recall mandate July 22, 1997, denied July 28. Petition to rehear en banc motion to recall mandate July 30, 1997, oral argument Aug. 1. Mandate recalled, habeas relief granted, and mandate issued Aug. 3, 1997. Reversed by Supreme Court April 29, 1998, with instructions to reissue original mandate denying relief.

Filed 60(b) motion in District Court, denied. Appeal docketed as case 97-99018, July 28, 1997. Dismissed as moot Aug. 3, 1997 (same day as decision recalling mandate, above). En banc vote called, failed. Motion to reinstate appeal May 13, 1998 (after Supreme Court decision, above). Court orders briefing and oral argument, June 10, 1998. Argued en banc July 9, 1998. Denial of 60(b) affirmed and leave to file successive denied July 11, 1998. Filed certiorari, mandamus, and original habeas in Supreme Court, all denied July 13, 1998.

Jess Gillies, Arizona, executed Jan. 13, 1999:

First habeas case 96-99010, certiorari denied Oct. 5, 1998, rehearing denied Nov. 30, 1998. Mandate had already issued. No further proceedings of substance on that case. Appealed

from dismissal of civil rights suit, 99-99000. Filed original habeas in Court of Appeals, 99-80004.

Darick Gerlaugh, Arizona, executed Feb. 3, 1999:

First habeas case 95-99018, certiorari denied Oct. 5, 1998. Mandate had already issued. No further proceedings of substance on that case. Appealed from dismissal of civil rights suit in District Court, 99-99000. Filed original habeas in Court of Appeals, 99-80004.

Jaturun Siripongs, California, executed Feb. 24, 1999:

Habeas case 97-99003, certiorari denied Oct. 5, 1998. Mandate issued Oct. 13, 1998.

Filed civil suit in District Court against governor regarding clemency procedures. Governor's mandamus petition denied Nov. 16, 1998. New clemency hearing held.

Motion to recall mandate in 97-99003 and motion for leave to file successive petition, 99-70166, filed Feb. 5, 1999, both denied Feb. 8. En banc vote called and failed same day.

Karl LaGrand, Arizona, executed Feb. 24, 1999:

First habeas case 95-99010, certiorari denied Nov. 2, 1998, rehearing denied Dec. 7, 1998. Mandate had already issued. No further proceedings of substance on that case.

Leave to file successive petition, 99-70180, denied as unnecessary on gas chamber claim (based on *Martinez-Villareal*), and denied as to other claims.

Appeal from District Court's denial of habeas on gas chamber claim, 99-99004, COA granted and reversed on merits, injunction issued, Feb. 24, 1999. Vacated by Supreme Court same day, 525 U. S. 1173.

Walter LaGrand, Arizona, executed Mar. 3, 1999:

First habeas case 95-99011, consolidated with Karl's, same disposition.

Civil suit on clemency procedures, 99-15314, dismissal affirmed Mar. 3, 1999.

Leave to file successive petition and stay denied, 99-70215, Mar. 2, 1999.

Mandamus denied, 99-70221, Mar. 3, 1999.

Stay denied, 99-99005, Mar. 3, 1999.

Use of gas enjoined on successive petition, 99-99006, Mar. 3, 1999, vacated by Supreme Court the same day, 526 U. S. 115.

Manuel Babbitt, California, executed May 4, 1999:

First habeas case 97-99011, certiorari denied Feb. 22, 1999. Mandate issued. Motion for leave to file successive petition, 99-70526, denied May 3, 1999. Judge called for en banc vote, failed. Petition for certiorari (despite 28 U. S. C. § 2244(b)(3)(E)) and original habeas in Supreme Court denied May 4, 1999.

Robert Vickers, Arizona, executed May 5, 1999:

Habeas case 96-99022, certiorari denied Jan. 11, 1999. Mandate had already issued. Motion to recall mandate filed April 30, 1999. Telephonic oral argument held on motion May 1, 1999. Denied same day.

Michael Poland, Arizona, executed June 17, 1999:

First habeas case 95-99022, certiorari denied Apr. 20, 1998. Mandate had already issued. Motion to recall mandate Oct. 15, 1998, denied next day.

Attempted to amend petition in District Court, recharacterized by D.C. to be a new petition raising a *Ford* claim (competency to be executed). Denial affirmed, 99-99016, June 16, 1999.

Another petition, filed in and denied by D.C. June 16, 1999, affirmed and leave to file successive denied, 99-99107, same day.

Two original habeas petitions and two certiorari petitions in Supreme Court denied same day, 527 U. S. 1017.

Ignacio Ortiz, Arizona, executed Oct. 27, 1999:

First habeas case 96-99024, certiorari denied May 17, 1999. Mandate had already issued.

Moved in District Court for relief under Rule 60(b). Denial affirmed, 99-99027, Oct. 25, 1999.

Anthony Chaney, Arizona, executed Feb. 16, 2000:

Habeas case 96-99001. Rehearing and rehearing en banc denied Mar. 11, 1999. Mandate issued Mar. 24, 1999. Motion to direct the Clerk of the Supreme Court to file petition for certiorari out of time denied Oct. 4, 1999, 99M1, 528 U. S. 802. Motion to recall mandate filed Feb. 2, 2000, denied Feb. 8, 2000.

Patrick Poland, Arizona, executed Mar. 15, 2000:

First habeas cases 97-99004 and 97-99005, certiorari denied Oct. 4, 1999. Mandate had already issued.

Leave to file successive petition, 00-70280, denied Mar. 13, 2000. Petition for certiorari (despite 28 U. S. C. § 2244(b)(3)(E)) dismissed for want of jurisdiction and original habeas denied, Mar. 15, 2000, 529 U. S. 1013.

Darrell Rich, California, executed Mar. 15, 2000:

Habeas case 97-99007, certiorari denied Jan. 10, 2000. Mandate issued Jan. 25, 2000.

Civil suit denial of injunction affirmed, 00-99004, Mar. 14, 2000, en banc denied same day, certiorari and stay denied same day, 529 U. S. 1013.

Stephen Anderson, California, executed Jan. 29, 2002:

Habeas case 98-99024. Rehearing and en banc denied May 31, 2001. Mandate stayed for certiorari. Motion for renewed petition for rehearing and continued stay of mandate filed Nov. 9, 2001. (Supreme Court granted certiorari in three other cases on the same conference list on Nov. 8, 2001. See 534 U. S. 1015-1016. On that date, it was predictable with reasonable certainty that certiorari in *Anderson* would be denied on the first business day of the following week, Nov. 13.)

Panel denied motion to reopen Nov. 13, 2001. Supreme Court denied certiorari same day. Anderson moved to rehear motion en banc same day. Court treated as motion to reconsider. Denied with dissenting opinion Dec. 21, 2001. Mandate issued.

Filed mandamus against Clerk of the Ninth Circuit, 01-71771, Nov. 16, 2001. No ruling. Dismissed as moot Feb. 27, 2001.

Filed civil action against Governor and appealed from denial of TRO, 02-70109, Jan. 22, 2002. Injunction pending appeal denied Jan. 24, 2002. Certiorari denied Jan. 28, 2002, 534 U. S. 1119. Rehearing en banc denied Jan. 28, 2002. Certiorari denied again Jan. 29, 2002, 534 U. S. 1120.

Donald Beardslee, California, executed Jan. 19, 2005:

Habeas case 01-99007, rehearing and rehearing en banc denied Jan. 28, 2004. Motion for stay of mandate and for

reconsideration of rehearing filed Feb. 2, 2004. Stay for certiorari granted Feb. 9. Certiorari denied Oct. 4, 2004, 03-10650.

Motion for further stay of mandate for petition for rehearing in Supreme Court filed in Court of Appeals Oct. 4, 2004, granted Oct. 12. Motion for stay of mandate and renewed motion for COA filed Nov. 23. Supreme Court denied rehearing Nov. 29. Mandate stayed for oral argument Dec. 8. Oral argument held Dec. 15. More briefing ordered Dec. 16. Another oral argument Dec. 28. Supplemental opinion affirming denial of habeas Dec. 29.

Petition for rehearing and en banc filed Jan. 5, 2005, denied Jan. 6. App. for stay of execution for certiorari filed Jan. 11, denied Jan. 12. Certiorari denied Jan. 18, 04-8146.

Filed civil action against lethal injection in District Court Dec. 20, 2004. TRO and preliminary injunction denied, Jan. 7, 2005. Appealed to Ninth Circuit, 05-15042. Oral argument Jan. 12. Affirmed Jan. 14. Rehearing and rehearing en banc denied Jan. 15. Certiorari denied Jan. 18, 04-8157.